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No. 88-1770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF MACHINERY AND ALLIED PRODUCTS INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

LESLIE D. MILLER
Attorney
Machinery & Allied Products Institute
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8430

*LAWRENCE Z. LORBER
J. ROBERT KIRK
CATHERINE C. O'NEILL
KELLEY DRYE & WARREN
2300 M Street, N.W.
Washington, D.C. 20037
(202) 955-9600

Attorneys for Machinery & Allied Products Institute

(**Counsel of Record*)

June 1, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Where an employer has long maintained a collectively bargained program of benefits for former employees, which treats older employees more favorably than younger employees, may a court dissect the total program into parts and hold that one part, isolated from the remainder, discriminates against older employees under § 4(a)(1) of the Age Discrimination in Employment Act of 1967 ("ADEA").

2. Whether a plan that exists and pays benefits fails to qualify as a "bona fide employee benefit plan" within the meaning of § 4(f)(2) of the ADEA because it lacks age-related cost factors; this same question is now pending before the Court in *Public Employees Retirement System v. Betts*, No. 88-389.

3. Whether an employer whose conduct at the time was not contrary to the law as then pronounced and applied by other federal courts may be held in "willful" violation of the ADEA.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS CURIAE	1
I. SUMMARY OF ARGUMENT	3
II. ARGUMENT	3
A. The Decision Below Mandates The Payment Of Benefits Not Contemplated By Existing Plans And Promises The Reduction Or Elimination Of Future Pension Benefit Increases Or The Reduction Or Elimination Of Future Severance Benefits	3
1. Under The Decision Below, Employers Must Pay Both Pension And Severance Benefits To Employees Over Forty From Plans Not Designed To Support Double Benefits	5
a. Employers Would Be Precluded From Negotiating Collective Bargaining Agreements With Their Unions That, In The Event Of A Layoff, Could Provide A Balanced Package Of Offsetting Severance And Early Retirement Benefits To The Largest Group Of Affected Employees Given A Particular Cost Structure	5
b. Employers Planning A Business Restructuring Will Incur A Substantial Expense For Benefits That Would Not Have Been Anticipated At The Time The Severance And Early Retirement Plans Were Instituted And That Will Discourage Restructuring Needed By Companies To Remain Competitive	6

2. Contrary To The Intent Of Congress, The Decision Below Creates Major Incentives To Reduce Or Eliminate Future Pension Benefit Increases Or Reduce Or Eliminate All Discretionary Severance Payments That Would Otherwise Ease The Burden of Future Plant Closings 8

B. The Decision Below Ought To Be Reviewed Because, Contrary To The Will Of Congress, It Prohibits The Integration Of Employee Benefits Based On An Arbitrary View Of Their Purposes 10

1. Congress Has Enacted Legislation Expressly Authorizing The Integration Of Pension Benefits And A Variety Of Other Benefits, Including Severance Benefits 10

a. Federal Law Expressly Excludes From Eligibility For Severance Pay Federal Employees Eligible For An Immediate Retirement Benefit 10

b. Federal Statutes Expressly Reduce Or Eliminate Severance Pay For Military and Related Personnel Eligible For Immediate Retirement Benefits 11

c. The Employee Retirement Income Security Act Of 1974 Expressly Recognizes the Practice Of Reducing Pension Benefits In Consideration Of "Social Security Benefits And All Other Relevant Factors" 13

2. In *Alessi v. Raybestos-Manhattan, Inc.*, This Court Unanimously Endorsed The Integration of Retirement Benefits And Non-Retirement Benefits 15

3. The Third Circuit Ignored Important Factors Relied Upon By Other Courts In Judging Whether Benefits Are Part Of A Lawful, Integrated Plan 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES: Page

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) ..... 3,4,14,15,16 *passim*

EEOC v. Bordens, Inc., 724 F.2d 1390 (9th Cir. 1984) 17

EEOC v. Firestone Tire & Rubber Co., 650 F. Supp. 1561 (W.D. Tenn. 1987) 18

EEOC v. Great Atlantic & Pacific Tea Co., 618 F. Supp. 115 (D.C. Ohio 1985) 17

Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) .. 15

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980) 13

H. K. Porter v. NLRB, 397 US. 90 (1970) 6

Public Employees Retirement System v. Betts, No. 88-389 i

Vintilla v. United States Steel Corp. Plan For Employee Pension Benefits, 606 F. Supp. 640 (W.D. Pa. 1985) 8

STATUTES:

5 U.S.C.A. § 5595 (1980) 10,11

5 U.S.C.A. § 8336 (1980 and Supp. 1989) 11

10 U.S.C.A. § 1174 (1983) 12

10 U.S.C.A. § 1186(b) and (c) (1983) 12

14 U.S.C.A. § 286(b) (Supp. 1989) 12

14 U.S.C.A. § 286a(d) (Supp. 1989) 12-13

14 U.S.C.A. § 327(b) (Supp. 1989) 12

Age Discrimination In Employment Act of 1967, as amended, 29 U.S.C.A. §§ 621 *et seq.* (1982) ..... 2,4 *passim*

Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§ 1001 *et seq.* (1985 and Supp. 1989) 13,14

Table of Authorities Continued

Page

Worker Adjustment and Retraining Notification Act, 29 U.S.C.A. § 2101 *et seq.* (1988 and Supp. 1989) 9

33 U.S.C.A. § 853h(e)(1) (1986) 13

LEGISLATIVE HISTORY:

H.R. Rep. No. 807, 93rd Cong., 2d Sess. 69 (1974), *reprinted in 2 Legislative History of the Employee Retirement Income Security Act of 1974* at 3189 (1976) 14

Age Discrimination In Employment and Hearings on S.830 and S.788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, at 14, 29-30, 90th Cong., 1st Sess. (March 15-17, 1967) 4

MISCELLANEOUS:

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Westinghouse Electric Corporation v. Equal Employment Opportunity Commission (No.88-1170) 15,18,19

R. MacNabb, *Manufacturing Is Alive . . . and Changing*, Machinery and Allied Products Institute, pages 7 and 4 (employing U. S. Department of Commerce data) (April 1987) 7

President's Council of Economic Advisers, *Economic Indicators* (April 1989) 7

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BRIEF OF MACHINERY AND ALLIED PRODUCTS INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Machinery and Allied Products Institute ("MAPI") respectfully submits this brief amicus curiae, pursuant to the written consents of the parties.[1]

INTEREST OF THE AMICUS CURIAE

MAPI is a policy research institute with approximately 500 member companies including leading producers in heavy industry, electronics, precision instruments, telecommunications, computers, chemicals, oil and gas, aerospace,

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[1] Consents have been filed with the Clerk of the Court.

and other high-technology industries. MAPI acts in the public interest as an advocate for policies that stimulate productivity, growth, and innovation throughout the industrial sector, thereby enhancing U. S. competitiveness.

MAPI is aware that many companies, including a number of its members, have formulated comprehensive packages of retirement and severance benefits which enable employees to receive either immediate retirement benefits, severance and deferred retirement benefits, or some combination of the two with one sometimes reduced in consideration of the other. MAPI is concerned that the decision of the court below, prohibiting the integration of pension and severance benefits, will mandate the payment of unintended benefits under existing benefit plans. As a result, employers may be forced to reduce or even eliminate either severance or non-vested early retirement benefits.

The rule adopted by the court below is likely to have a significant impact on the level of benefits provided in the severance and pension plans of a significant number of MAPI member companies. In the near term, the decision will dramatically increase the cost of necessary restructuring efforts undertaken in response to economic change. In the long term, the decision is likely to increase the burden carried by displaced employees who will no longer enjoy voluntary severance programs which employers are likely to abandon in the wake of the Third Circuit's ruling. It is because of this potentially serious adverse effect on the performance of U. S. industry that MAPI has felt compelled to present its first brief as an amicus curiae.

MAPI believes that the present case provides the proper vehicle for the Court to recognize that the ADEA was not intended to deny employers and unions the flexibility to trade off severance and pension benefits in negotiating a coordinated package of post-employment benefits.

I. SUMMARY OF ARGUMENT

The Third Circuit's prohibition of the integration of pension and severance benefits mandates the payment of benefits not contemplated by existing plans. Because of the resulting significant increase in liability, employers may be discouraged from restructuring their businesses in order to remain competitive, or may be forced to reduce or eliminate future increases in pension benefits. At a time when Congress has expressed concern over the plight of workers who lose employment due to plant shut-downs, employers may find it necessary to reduce or eliminate future severance benefits that would otherwise ease the burden of future plant closings. In addition, by prohibiting employers and unions from effectively negotiating severance and pension plans, the Third Circuit's decision impairs and quite possibly precludes the ability of these parties to provide a benefits package most suitable to the particular entities they represent.

In addition, the decision below is inconsistent with statutes governing federal employees' benefits, with the rulings of other courts, and with this Court's determination that integrated benefits need not have a common purpose.

For the foregoing reasons, this Court should grant Petitioner's request for a Writ of Certiorari, and the judgment of the Third Circuit should be reviewed and reversed.

II. ARGUMENT

A. The Decision Below Mandates The Payment Of Benefits Not Contemplated By Existing Plans And Promises The Reduction Or Elimination Of Future Pension Benefit Increases Or The Reduction Or Elimination Of Future Severance Benefits

In *Alessi v. Raybestos, Manhattan*, 451 U.S. 504 (1981), this Court noted that approval of benefit integration was part of the legislative response to the inherent "tension

between the primary goal of benefitting employees and the subsidiary goal of containing pension costs." 451 U.S. at 515. The House Ways and Means Committee was aware:

> that many present plans are fully or partly integrated and that elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the growth or perhaps even eliminat[ing] private retirement plans.

Id.

Significantly, Congress was preoccupied with a very similar tension in crafting the ADEA. The primary goal of the ADEA was to promote employment opportunities for older workers. In order to achieve that goal, Congress knew it must avoid regulating benefits in a manner that increased the cost of employing older workers. The legislative history of the ADEA demonstrates its drafters' preoccupation with the need to make sure that in outlawing age discrimination the statute did not price older employees out of the market.[2]

The decision below dramatically disrupts the delicate balance of legislative goals underlying the ADEA. The practical effect of the Third Circuit's decision is to mandate preferential treatment of older employees at the expense of needed benefits for the larger population of displaced workers.

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[2] *Age Discrimination in Employment and Hearings on S.830 and S.788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, at 14, 29-30, 90th Cong., 1st Sess. (March 15-17, 1967).

1. Under the Decision Below, Employers Must Pay Both Pension And Severance Benefits To Employees Over Forty From Plans Not Designed To Support Double Benefits

If the decision below is allowed to stand, employers who establish severance programs for employees discharged for economic or business reasons and whose pension plans offer an early retirement option will be forced to pay both pension and severance benefits to employees over 40 years of age. Neither ERISA nor the ADEA compel the payment of such double benefits to employees who are discharged for economic reasons and who happen to be eligible for early retirement. Nor are employers who are forced by economic reasons to restructure and downsize their workforces in any position to meet these significant and unanticipated expenses which further dilute the resources available to restore the business to a viable state. To the contrary, the employers and unions which negotiated these plans did so with the specific intent that such double payments would not be made in order that the maximum number of employees would benefit. If employers are bound to provide a double level of benefits, the cost of those benefits may be so large as to encourage employers to reduce or eliminate future benefits, or as to vitiate any economic advantage that could be realized from a restructuring.

a. Employers Would Be Precluded From Negotiating Collective Bargaining Agreements With Their Unions That, In The Event Of A Layoff, Could Provide A Balanced Package Of Offsetting Severance And Early Retirement Benefits To The Largest Group Of Affected Employees Given A Particular Cost Structure

The decision below significantly impairs the ability of employers and unions to effectively negotiate severance and pension plans. The knowledge that these parties bring

to the bargaining table is invaluable; aware of the circumstances and needs surrounding their particular industry, the parties can trade off benefits in order to make available the most comprehensive benefit package under the circumstances to the broadest possible spectrum of employees. In the context of collective bargaining, severance agreements are developed by the parties most familiar with the needs and desires of the particular labor force in question and most interested in minimizing the burdens created by a plant closing or other restructuring. By eliminating the right of the parties to bargain with respect to the severance portion of the benefits package, the Third Circuit has precluded the parties from using their knowledge of the particular circumstances of the employees to provide the benefits package most suitable to that labor force. The decision of the Third Circuit, not compelled by the ADEA but based instead upon an overly expansive notion of an equitable balance between groups of employees, runs afoul of the fundamental jurisprudence of this Court that intervention into the substance of collective bargaining is to occur only in the most limited circumstances. *H.K. Porter v. NLRB*, 397 U.S. 90 (1970).

b. Employers Planning A Business Restructuring Will Incur A Substantial Expense For Benefits That Would Not Have Been Anticipated At The Time The Severance And Early Retirement Plans Were Instituted And That Will Discourage Restructuring Needed By Companies To Remain Competitive

The decision below will have a drastic effect on business decisions made by employers facing increased competition. Since the early 1970s, competition in both domestic and global markets for manufactured products and related services has increased significantly. The severity of this competition has forced most businesses to reallocate both capital and labor resources to those activities likely to increase the overall efficiency of operations. In particular,

the manufacturing sector has had to restructure both its capital base and employee configuration in order to regain its competitiveness. The cost for this restructuring has been enormous.[3] Yet, the relative growth in the economy—an average annual growth rate of 4.2 percent from 1982 through 1987, well above this nation's long-run growth rate of approximately three percent—and the substantial reduction of unemployment from its peak in 1983 of 10,717,000 to 6,701,000 in 1988 indicate that these wrenching efforts have borne fruit.[4] Businesses which have faced this decision generally have attempted to provide ample adjustment assistance to those employees affected adversely. To provide this adjustment assistance, businesses have had to finely allocate their resources so as to revive the economic viability of their enterprise as well as buffer the impact on employees. The decision of the Third Circuit shatters this balance by causing an unanticipated cost to employers not required by law by reallocating moneys between employees eligible for early retirement and employees who are ineligible for early retirement.

The significant increase in costs which would be incurred in making severance payments due to the Third Circuit's decision may well discourage companies from proceeding with restructurings in the future. Such companies may be forced to retain their investment of capital and labor in uneconomic facilities rather than to reallocate those re-

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[3] For example, the percent distribution of constant (1982) dollar value added of the primary metal industries fell from 11.2 percent in 1960 to 4.4 percent in 1985, while that for machinery, except electrical (including data processing equipment), increased from 10.1 percent to 17.3 percent over the same period. Similarly, the percentage of employment accounted for by manufacturing dropped from 31.0 percent in 1960 to 19.8 percent in 1985. R. MacNabb, *Manufacturing Is Alive . . . and Changing*, Machinery and Allied Products Institute, pages 7 and 4 (employing U. S. Department of Commerce data) (April 1987).

[4] President's Council of Economic Advisers, *Economic Indicators* (April 1989).

sources to more productive investments, with the result that such companies would have difficulty remaining competitive. As a company's ability to compete is lost, its overall employment levels are likely to decline substantially. Thus, by engaging in legal micromanaging of employee benefits, the Third Circuit ignores the realities of the competitive challenges facing industry, thereby threatening the ability of many businesses to remain competitive.

2. Contrary To The Intent Of Congress, The Decision Below Creates Major Incentives To Reduce Or Eliminate Future Pension Benefit Increases Or Reduce Or Eliminate All Discretionary Severance Payments That Would Otherwise Ease The Burden Of Future Plan Closings

As mentioned by the district court in *Vintilla v. United States Steel Corp. Plan for Employee Pension Benefits*, 606 F.Supp. 640 (W.D. Pa. 1985), *aff'd*, 782 F.2d 1033 (3d Cir.), *cert. denied*, 475 U.S. 1141 (1986), integration provides a "practical method of extending fund resources while maintaining a consistent or increasing level of payments among recipients;" "the more outside income available to plan beneficiaries, the more pension money may be saved by setoff, within limits. The savings would permit the fund to pay a higher average pension." 606 F. Supp. at 643. Therefore, the level of immediate retirement benefits provided to older employees under existing collective bargaining agreements was made possible by the discount of the severance payment offset. Should the Third Circuit's decision stand, employers will not be able to maintain such a high level of pension benefit in the future. Employers may be encouraged to forego an increase in pension benefits, or to increase the requirements necessary in the future for employees to become eligible for immediate retirement benefits.

Of even more concern, the Third Circuit's decision strongly encourages employers to reduce the amount of

severance payments which such employers have voluntarily provided for their employees. In fact, the decision by the court below creates an incentive for employers to eliminate entirely such discretionary severance payments which would otherwise ease the burden on employees of future plant closings. By discouraging these payments, the decision below runs completely contrary to the intent of Congress. Under the Worker Adjustment and Retraining Notification Act of 1988 ("WARN"), 29 U.S.C.A. §§ 2101 *et seq.* employers with more than 100 full-time employees are required to give 60 days' advance notice of certain plant closings or "mass layoffs." 29 U.S.C.A. § 2102 (Supp. 1989). An employer who fails to give the requisite notice is generally liable for monetary damages to the affected employees; however, under Section 5(a)(2)(B) of WARN, the employer's liability is reduced by any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation.[5] Thus, WARN allows voluntary severance payments to be an opportunity to reduce an employer's liability for failure to give the proper notice, and thus encourages voluntary payments to employees. Here again, the Congress has reiterated its policy of encouraging the provision of voluntary severance plans.

The Third Circuit's analysis was conducted with blinders on, focusing on a narrow point in the full mosaic of employee benefits and protections rather than comprehending the full scope and interactive nature of our economic system and imperatives including employee benefits. These policy issues create a compelling reason for the petition to be granted and the decision below reversed.

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[5] 29 U.S.C.A. § 2104(a)(2)(B) (Supp. 1989).

B. The Decision Below Ought To Be Reviewed Because, Contrary To The Will Of Congress, It Prohibits The Integration Of Employee Benefits Based On An Arbitrary View Of Their Purposes

1. Congress Has Enacted Legislation Expressly Authorizing The Integration Of Pension Benefits And A Variety Of Other Benefits, Including Severance Benefits

In the ADEA, Congress did not speak directly to the propriety of integrating retirement benefits and non-retirement benefits, such as severance benefits. But Congress repeatedly has enacted legislation which has addressed the issue head-on. These statutes make it very clear that, for decades, Congress has approved the practice of reducing or eliminating benefits—such as severance benefits—for employees entitled to an immediate retirement benefit. Had the issue been addressed in the ADEA, there should be no doubt that Congress would have approved the very same benefit integration it had already mandated for federal employees and military personnel. To believe otherwise would require the conclusion that Congress has itself structured benefit plans violating the intent of the ADEA ever since 1974 when federal employees and military personnel were brought within the coverage of the Act. *See* 29 U.S.C.A. § 633a(a) (1985).

a. Federal Law Expressly Excludes From Eligibility For Severance Pay Federal Employees Eligible For An Immediate Retirement Benefit

In 1967, Congress enacted a severance pay plan for most federal employees employed for at least twelve months and separated from service involuntarily. 5 U.S.C.A. § 5595 (1980). However, Congress specifically excluded from eligibility for severance benefits:

> an employee who . . ., at the time of separation from the service, has fulfilled the requirements

> for immediate annuity under [any applicable retirement system].

5 U.S.C.A. § 5595(a)(2)(B)(iv) (1980). Like most private retirement plans, the Civil Service Retirement Act grants an immediate retirement annuity to employees of a certain age who have completed a certain number of years of service. 5 U.S.C.A. § 8336 (1980). For example, a federal employee separated involuntarily is entitled to an immediate annuity if he has completed 25 years of service, or only 20 years of service if he is 50 or more years of age. 5 U.S.C.A. § 8336(d) (Supp. 1989).

Thus, Congress has created a severance benefit system for federal employees which expressly conditions the payment of severance benefits on ineligibility for age-based retirement benefits—the very same benefit integration written into Petitioner's early severance and pension plans. Under the reasoning of the court below, the federal government violates the spirit of the ADEA each and every time it denies severance benefits to displaced older employees who are pension eligible.

b. Federal Statutes Expressly Reduce Or Eliminate Severance Pay For Military And Related Personnel Eligible For Immediate Retirement Benefits

Just as with federal employees, Congress has enacted a series of laws which reduce or deny severance benefits for military personnel who are eligible for an immediate retirement benefit upon separation from their service.

In 1963, Congress provided statutory severance benefits for Coast Guard officers who are discharged or separated from service under a variety of authorities. However, in each case Congress required trade-offs between retirement and severance benefits. Certain discharged officers are entitled to a lump-sum severance payment, but Congress required that the officers' retirement benefits be reduced in

consideration of the lump-sum payment.[6] In other cases, severance pay is provided only if the officer is *in*eligible for voluntary retirement. 14 U.S.C.A. § 327(b) (Supp. 1989).

In 1980, Congress again integrated severance and pension benefits in legislation providing severance pay for military personnel upon involuntary discharge or release from active duty. 10 U.S.C.A. § 1174 (1983). The statute specifically denies severance pay to a member of the armed forces who "upon discharge or release from active duty is immediately eligible for retired or retainer pay based on his military service." 10 U.S.C.A. § 1174(e) (1983). The same legislation grants separation pay to an officer removed from active duty, but only if such officer is *in*eligible for voluntary retirement on the date of such removal. If eligible for voluntary retirement, the officer receives retired pay but no separation pay. 10 U.S.C.A. § 1186(b) and (c) (1983). The same legislation also provided severance pay for certain Coast Guard officers, but with a setoff provision which reduces retirement payments in consideration of severance payments.[7]

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[6] The statute provides:

> The acceptance of a lump-sum payment under this section does not deprive a person of any retirement benefits from the United States. *However, there shall be deducted from each of his retirement payments so much thereof as is based on the service for which he has received payment under this section until the total amount deducted equals the amount of the lump-sum payments.*

14 U.S.C.A. § 286(b) (Supp. 1989) (emphasis added).

[7] The statutes provides:

> The acceptance of severance pay under this section does not deprive a person of any retirement benefits from the United States. However, there shall be deducted from each of the retirement payments so much thereof as is based on the service for which he has received severance pay under this section, until the total deductions equal the amount of

In the 1984 amendments to the Coast and Geodetic Survey Commissioned Officers Act of 1948, Congress once again specifically prohibited payment of the full amount of both retirement *and* separation benefits.[8]

c. The Employee Retirement Income Security Act Of 1974 Expressly Recognizes The Practice Of Reducing Pension Benefits In Consideration Of "Social Security Benefits And All Other Relevant Factors"

In 1974—seven years after enactment of the ADEA—Congress passed ERISA. Unlike the ADEA, ERISA focused exclusively on employee benefit plans, both retirement plans and non-retirement welfare plans. This Court has described ERISA as a "comprehensive and reticulated statute" produced by an exhaustive study of methods for improving the administration of the nation's private pension plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). One product of this exhaustive study was the conclusion that benefits received from sources other than a pension plan *may* be taken into account to reduce the amount of a defined pension benefit.

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such severance pay. However, no person is entitled to severance pay under this section in an amount that is more than $15,000.

14 U.S.C.A. § 286a(d) (Supp. 1989).

[8] The statute provides:

> An officer who has received separation pay under this section, or . . . severance pay . . . under any other provision of law . . . and who later qualifies for retired pay under this Act shall have deducted from each payment of retired pay so much of that pay as is based on the service for which the officer received that separation pay . . . until the total amount deducted is equal to the total amount of separation pay . . . received.

33 U.S.C.A. §853h(e)(1) (1986).

ERISA establishes certain benefit accrual requirements for all pension plans. 29 U.S.C.A. § 1054 (Supp. 1989). With respect to defined benefit plans, the Act imposes certain limits on methods for calculating the benefit to which an employee is due, including certain minimum levels of benefits. Repeatedly, Congress punctuated these plan requirements with the following provision:

> For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

29 U.S.C.A. §§ 1054(b)(1)(A)(ii); 1054(b)(1)(B)(iv); and 1054(b)(1)(C) (Supp. 1989).

Clearly, Congress intended to permit pension benefits to be reduced not only in consideration of social security benefits but in consideration of "all other relevant factors," meaning other sources of income with a value to "be treated as remaining constant. . . ." Congress was well aware that some of these sources, such as social security benefits, would only be available to older workers. Moreover, "Congress was well aware that pooling of nonpension retirement benefits and pension funds would limit the total income maintenance payments received by individual employees and reduce the cost of pension plans to employers." *Alessi v. Raybestos-Manhattan, Inc.*, *supra*, at 514-15. Congress not only permitted benefit integration but recognized that, by reducing plan costs, integration would promote important legislative goals of plan solvency and growth.[9]

In short, on repeated occasions both before and after enactment of the ADEA, Congress has deliberately re-

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[9] H.R. Rep. No. 807, 93rd Cong., 2d Sess. 69 (1974), *reprinted in 2 Legislative History of the Employee Retirement Income Security Act of 1974* at 3189 (1976).

duced or eliminated benefits otherwise due based on an employee's eligibility for other sources of post-employment income available, in part, because the employee had reached a certain age. The decision below would have the effect of judging each of these benefit plans as constituting unlawful age discrimination, despite the fact that they were authored by the same hand that outlawed age discrimination in the ADEA. The decision below requires the conclusion "that Congress itself has repeatedly flaunted its own declaration of policy." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 90 (1973). This Court has warned that it will not "lightly find such a breach of faith." *Id.* at 90-91.

The foregoing record of federal legislation is compelling evidence that the decision below misinterprets the ADEA and squarely contradicts the intent of Congress.

2. In *Alessi v. Raybestos-Manhattan, Inc.*, This Court Unanimously Endorsed The Integration Of Retirement Benefits and Non-Retirement Benefits

The decision below insists that pension benefits and severance benefits—like apples and oranges—are so fundamentally different in nature that substituting one for the other cannot be permitted. The Third Circuit wrote:

> Under [Petitioner's] plans, severance pay and pension benefits have distinctly different purposes. Severance pay was a short term fringe benefit to provide financial assistance during the adjustment period immediately following layoff; pension benefits were long-term retirement benefits. The district court concluded that pension benefits are not a substitute for severance pay. We agree.[10]

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[10] See Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit, Appendix at 20a (hereinafter "Pet. App. at ____ ").

In *Alessi*, *supra*, this Court did not agree. Instead, it held that pension and non-pension benefits may be integrated. Indeed, this Court specifically rejected the contention that benefits may be integrated only if they share a common purpose.

In *Alessi*, two pension plans provided that an employee's retirement benefits would be reduced, or offset, by the amount of all workers' compensation awards for which the employee was eligible. Retired employees argued, in part, that Congress intended to limit setoffs only to situations in which one long-term retirement benefit was substituted for another. Every participating Justice of this Court disagreed.[11]

> [R]etirees claim that workers' compensation provides payments for work-related injuries, while Social Security and Railroad Retirement supply payments solely for wages lost due to retirement. Because of this distinction, retirees conclude that integration of pension funds with workers' compensation awards lacks the rationale behind integration of pension funds with Social Security and Railroad Retirement. Retirees' claim presumes that ERISA permits integration with Social Security or Railroad Retirement only where there is an identity between the purposes of pension payments and the purposes of the other integrated benefits. *But not even the funds that the Congress clearly has approved for integration purposes share the identity of purpose ascribed to them by petitioners.* Both the Social Security and Railroad Retirement Acts provide payments for disability as well as the wages lost due to retirement, and ERISA permits pension integration without distinguishing these different kinds of benefits.

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[11] Justice Brennan took no part in the decision of *Alessi*.

Id. at 518-19 (emphasis added).

Thus, there is no basis in law or policy to conclude that severance and retirement benefits may not be integrated because of their different purposes. The misguided analysis that led to this conclusion by the court below should be reviewed by this Court.

3. The Third Circuit Ignored Important Factors Relied Upon By Other Courts In Judging Whether Benefits Are Part Of A Lawful, Integrated Plan

The decision below relied on an arbitrary, meaningless distinction between the purposes of severance and retirement benefits in reaching the erroneous conclusion that these categories of benefits may not be integrated as a matter of law. In doing so, the Third Circuit failed to credit important characteristics of benefit plans which ought to guide a judgment about whether they are properly integrated.

Courts have paid particular attention to whether an employer and its unions have negotiated the integrated benefits concurrently and, therefore, have viewed them as comprising a single economic bargaining package.[12] Reliance on this factor is consistent with an important federal policy underlying the law of employee benefits: Congress does not mandate the outcome of benefit negotiations but simply sets the bounds within which those negotiations must occur.

A critical error of the decision below is its failure to credit the fact that Petitioner's pension and severance plans were the product of good-faith, contemporaneous bargaining between Petitioner and its unions on all elements of a benefits package. Severance and pension ben-

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[12] *See, e.g. EEOC v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. Great Atlantic and Pacific Tea Co.*, 618 F. Supp. 115 (D.C. Ohio 1985).

efits were traded off in the collective bargaining process. Clearly, Petitioner and its unions sought to provide income continuation for a broad group of displaced employees while holding the cost of that program to manageable, though steadily increasing, levels. Petitioner's pension and severance agreements were produced by the parties most familiar with the needs of Petitioner's labor force and most interested in minimizing the burdens created by a plant closing or other restructuring. In this context, the package of benefits enjoyed by Petitioner's employees cannot be viewed—in fact or in law—as anything other than a single, integrated whole.

Another factor properly considered is the length of time the benefits have been in existence. In *EEOC v. Firestone Tire & Rubber Co.*, 650 F.Supp. 1561 (W.D. Tenn. 1987), the court found that pension and severance benefits were properly integrated because, *inter alia*, the severance benefits had been part of the pension plan for over thirty years. It is most reasonable to believe that when benefit issues have shared space on a bargaining table for such an extended period, the resulting benefit package reflects the genuine integration of competing interests.

The court below appeared unmindful of the lengthy, complex course of bargaining which preceded Petitioner's current benefit plans—bargaining which predated the ADEA by many years. The retirement and severance elements of a benefits package evolved during decades of negotiation certainly are "integral components of a comprehensive employee benefits scheme." Pet. App. at 26a. The Third Circuit's conclusion that pension benefits cannot, as a matter of law, substitute for severance pay is simply wrong.

The fact is that Petitioner's older employees never were entitled to severance pay "in addition to, not a part of" an integrated benefits package in which severance benefits were conditioned, in part, on the employee's retirement

status. Pet. App. at 17a. In reality, neither the pension nor severance portions of the benefits package "pre-existed" the other because they were negotiated simultaneously. Older employees were not deprived of any entitlement—rather, their representatives negotiated with Petitioner and obtained certain entitlements, but not others. That negotiated benefits packages contain limited entitlements is an economic fact of life, not the basis for legal liability.

Congress never intended the ADEA to require unexpected payments of millions of dollars of benefits to older employees based on the faulty notion that pension and severance benefits may never be set off against one another.

III. CONCLUSION

The decision below inexcusably interferes with the good-faith collective bargaining process and the well-tailored integrated benefits packages which that process often produces. The decision handcuffs employers from rationally allocating limited resources to maximize economic viability and preserve the greatest number of jobs on a long-term basis. In doing so, the decision threatens the maintenance of pension benefits at their current level, the existence of voluntary severance benefits, and the competitiveness of many businesses. In addition, the decision represents judicial policymaking neither compelled by the ADEA nor consistent with Congressional action or intent. For all of the foregoing reasons, this Court should grant Petitioner's

request for a Writ of Certiorari and the judgment of the Third Circuit should be reviewed and reversed.

Of Counsel:

LESLIE D. MILLER
Attorney
Machinery & Allied
Products Institute
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8430

Respectfully submitted,

*LAWRENCE Z. LORBER
J. ROBERT KIRK
CATHERINE C. O'NEILL
KELLEY DRYE & WARREN
2300 M Street, N.W.
Washington, D. C. 20037
(202) 955-9600

Attorneys for Machinery & Allied Products Institute

*(*Counsel of Record)*

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